



Environmental Liability Exemptions for Lenders and Representatives

Wisconsin Department of Natural Resources

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Lenders are important in many economic development projects, but their role is especially important in the challenging redevelopment of brownfields. Brownfields are abandoned, idle or underused commercial or industrial properties, where the expansion or redevelopment is hindered by real or perceived contamination.

In order to encourage the redevelopment of brownfields and take away the concerns about liability burdens, Wisconsin's Spill law has an exemption for lenders and representatives who meet the conditions described in state law. This fact sheet describes those state liability protections for lenders as well as those available from federal environmental laws.

Examples of situations where this fact sheet could be helpful:

"A client seeks a loan to purchase an older industrial property. If environmental contamination is found on the land and the client cannot repay the loan, will our lending institution be held liable for an environmental cleanup in the event of foreclosure? These concerns may cause us to refuse this loan."



"Our client owns an industrial property, and has asked our law firm to be the executor of his will. Could our firm be held liable for cleaning up any environmental problems found on the property,

even though we are just the executors of the will?"

"We hold the first mortgage on a tax delinquent property and the business has declared bankruptcy. If we foreclose and take title to the property, what should we do to qualify for the cleanup liability exemption?"



Wisconsin Department of Natural Resources
P.O. Box 7921, Madison, WI 53707



What is the Hazardous Substance Discharge Law?

The Hazardous Substance Discharge Law, also known as the Spill Law, s. 292.11, Wis. Stats., requires that persons who “possess,” “cause,” or “control” a hazardous substance discharge take necessary actions to restore the environment to the extent practicable and minimize harmful effects from the discharge. Certain liability exemptions are available for parties who meet the provisions in state statutes. Exemptions that affect lenders and representatives are found in s. 292.21, Wis. Stats.

Who is a “Lender”?

Groups or individuals whose primary business is to engage in lending activities are considered to be lenders and include the following:



- banks;
- credit unions;
- savings banks;
- savings and loan associations; and
- mortgage bankers.

Also, included as lenders are the three following entities engaged in secured lending:

- insurance companies;
- pension fund; and
- government agencies.

Who is a "Representative"?

A "representative" is a person acting in the capacity of a:

- conservator;
- guardian;
- court-appointed receiver;
- personal representative;
- executor;
- administrator;
- testamentary trustee of a deceased person;
- trustee of a living trust; or
- fiduciary of real or personal property.

When Can a Lender or Representative Be Released From Liability Under the Spill Law?

Lenders and representatives can be released from liability under the Spill Law in five situations identified by the law. Each situation has conditions and requirements that need to be met, in order for lenders or representatives not to “possess, control or cause” a hazardous substance discharge.

These five situations are: normal lending, acquiring property through foreclosure, inspecting property, enforcing a security interest in personal property and fixtures, and being a representative.

For the most part, the liability exemptions described below are self implementing and do not require Department of Natural Resources (DNR) review or approval. The two exceptions that require DNR involvement are:

- 1) if the lender asks for a liability clarification letter by submitting a fee, and
- 2) if the lender chooses to submit an environmental assessment that is more than one year old, a review fee is required.

Both requests are submitted to DNR using Form 4400-237, available at:
<http://dnr.wi.gov/org/aw/rr/archives/pubs/4400-237.pdf> (or see
<http://dnr.wi.gov/org/aw/rr/liability/index.htm>);

1. Normal Lending

A lender who engages solely in lending activities is not considered to possess, control or be a causer of a hazardous substance discharge, unless:

- the lender physically causes a discharge of a hazardous substance; or
- the lender's tortious conduct causes a discharge or makes an existing discharge worse.

2. Acquiring Property

A lender who acquires title to, possession of, or control of real property through the enforcement of a security interest (i.e., foreclosure) is not liable under the state Spill law or other state laws for a hazardous substance discharge on the property if the following conditions are met.

Generally, a **security interest** is a person's right to repayment of money, the performance of a duty, or any other obligation as part of a mortgage, deed of trust, assignment, judgment lien, pledge, security agreement, factoring agreement, or lease.

What is the difference between “real property” and “personal property”?

Real property is defined as land and that which is affixed to land (buildings, trees, etc.).

Personal property is generally all property other than real estate.

- The lender does not intentionally or negligently cause a discharge or exacerbate an existing discharge.
- The lender immediately notifies the DNR of any known discharge, as required by ch. NR 706 (A submittal of an environmental assessment does not satisfy the reporting requirements).
- The lender conducts an environmental assessment of the property which meets all the requirements of s. 292.21 (1)(c)2, Wis. Stats. Please note that this assessment must be completed not more than 90 days after the date the lender acquires title to, possession or control of the property. The environmental assessment report must be filed with the DNR not more than 180 days after the date the lender acquired title to,

possession, or control of the property; **the assessment requirements are described in more detail on pages 6 and 7.**

- If a discharge occurs on or after the date on which the lender acquires title to, or possession or control of the property, the lender is not managing or operating a business on the property and is not conducting the conclusion of the borrower's business.
- The lender conducts an emergency response action in response to any discharge that occurs on or after the date the lender acquires title to, possession or control of the property.
- The lender agrees to allow the DNR or the responsible party access to the property to take response actions and agrees to avoid interference with actions taken to respond to the discharge.

3. Inspecting Property

A lender who inspects property for compliance with environmental laws, conducts an environmental assessment, conducts an environmental investigation, or performs cleanup actions is not considered to possess, control or cause a hazardous substance discharge if the following conditions are met.

- The inspecting activities occur before the date the lender acquires title, possession or control of the property through enforcement of a security interest.
- The DNR is immediately notified of any identified discharges as a result of inspecting activities.
- Any investigation or cleanup conducted by the lender is done in accordance with DNR rules.
- The lender does not physically cause a discharge.
- The lender does not cause a new discharge or exacerbate an existing discharge through tortious conduct.



4. Enforcing a Security Interest in Personal Property and Fixtures

A lender who enforces a security interest in personal property or fixtures (e.g. large equipment) at a particular location, but is not acquiring title to, possession, or control of the real property at that location, is not considered to possess, control, or cause a hazardous substance discharge if the following conditions are met.

- The lender notifies the DNR and the borrower of any decision not to accept specific personal property or fixtures within 30 days after the lender enters the property.
- The lender provides written notice to the DNR of the location of the real property and the personal property or fixtures and a description of the personal property or fixtures within 30 days after entering the property.
- The lender permits reasonable access to the personal property or fixtures to the DNR or the borrower.
- The lender does not engage in the operation of a business, nor has any involvement with the business of the borrower on the property where the personal property is

located, except for actions that are undertaken to protect the property and are approved by the DNR in writing.

5. Being a Representative

A representative who acquires title to, possession of, or control of property is not personally liable for a hazardous substance discharge if the following conditions are met.

- The representative does not knowingly, willfully, recklessly or physically cause a discharge.
- The representative acquires title to, possession, or control of property in the capacity of a representative.
- The representative does not have a beneficial interest in a trust, estate or entity that owns, possesses or controls the property.
- The representative does not knowingly, willfully or recklessly fail to notify the DNR of a discharge.

A representative would be considered to be liable for a hazardous substance discharge if:

- the representative knew or should have known that the trust, estate or similar entity for which the representative is acting was established, or assets were transferred to the trust, estate, or similar entity, in order to avoid responsibility for a discharge; or
- a representative did not act in good faith to cause the trust, estate or similar entity to take the necessary environmental actions, or to reimburse DNR for actions taken by the DNR under s. 292.11(7)(b), Wis. Stats.



Reporting a Discharge

Lenders who inspect or acquire property are required to immediately report to the DNR all discharges of hazardous substances that adversely impact, or threaten to adversely impact public health, welfare or the environment. NR 706, the spill notification rule, specifies the details of the reporting requirements. To report a discharge, notify the local DNR office where the property is located. For non-emergency discharges, use the Fax Notification for Hazardous Substance Discharge available at: <http://dnr.wi.gov/org/aw/rr/archives/pubs/4400-225.pdf>. For emergency situations, call the 24-hour spill reporting hotline: 1-800-943-0003.

Environmental Assessments Needed for Acquiring Real Property

If a lender acquires real property and wants to qualify for the liability exemption, the lender must conduct an environmental assessment that contains the elements listed in 292.21(1)(c)2, Wis. Stats. Note: These requirements come from state law and are not related to “shelf life” requirements that may be found in other technical standards for conducting environmental assessments or due diligence.

The environmental assessment may have either been conducted within one year prior to or done not more than 90 days following acquisition of title, possession or control of the property. The assessment must be filed with the DNR not more than 180 days after the date of acquiring the property.

The lender may submit an environmental assessment that was conducted more than one year before the lender acquired the property, but must also conduct a visual inspection of the property after acquiring the property. A lender who chooses to submit an older assessment must submit it to the DNR **not later than 90 days after the lender acquires the real property**, along with the results of the visual inspection and a \$500 review fee. DNR staff will then review both the old assessment and visual inspection update to determine if the assessment is adequate or whether any inadequacies need to be addressed.

If the assessment is not required to be reviewed by DNR, a lender has the option to request a site-specific lender liability clarification letter from DNR, which is available for a fee. See Question 7 on page 11 for more information about fees and DNR's responses.

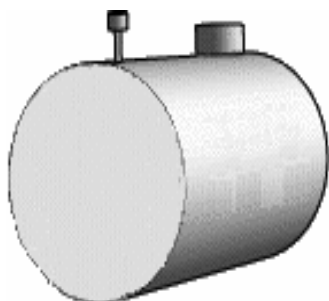
To qualify for the liability exemption, the environmental assessment must include the following elements:

- Visual inspection of the real property.
- Visual inspection and description of the personal property located on the real property that may constitute a hazardous waste or hazardous substance or that has a significant risk of being discharged.
- Review of the ownership and use history of the real property, including a search of title records showing prior ownership of the property for a period of 80 years previous to the date of the visual inspection.
- Review of historic and recent aerial photographs of the real property.
- Review of the environmental licenses, permits or orders issued with respect to the real property.
- Evaluation of the results of any environmental sampling and analysis that has been conducted.
- Review to determine if the real property is included on certain lists of sites or facilities that may pose a threat to human health or the environment, such as US EPA's CERCLIS Database, which is available at: <http://www.epa.gov/superfund/sites/cursites/>; National Priorities List; or archived sites. DNR has a publication describing available databases of the state's contaminated properties at: <http://dnr.wi.gov/org/aw/rr/archives/pubs/RR673.pdf>.

- Collection and analysis of representative samples of soil or other materials in the ground that are suspected of being contaminated based on observations or aerial photographs, including stained or discolored soil or other materials in the ground and including soil or materials in the ground in areas with dead or distressed vegetation; the collection and analysis will identify contaminants in the soil or other materials in the ground and shall quantify concentrations.
- Collection and analysis of representative samples of unknown wastes or potentially hazardous substances found on the property, and concentrations of hazardous waste and hazardous substances found in tanks, drums, or other containers, or in piles or lagoons on the real property.

Lender Exemptions from Federal Liability

In addition to the exemptions from state law described above, federal environmental laws also contain liability exemptions for lenders. The Resource Conservation and Recovery Act (RCRA) Subtitle I, contains the regulatory requirements for petroleum underground storage tanks (USTs) and exempts certain lenders from liability. Also, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (commonly known as Superfund), contains a security interest exemption which protects certain lenders under Superfund.



Lender Protection from Federal Underground Storage Tank Laws

Subtitle I of RCRA contains a "security interest exemption" that provides secured creditors (i.e. lenders) an explicit statutory exemption from corrective action (cleanup) liability for releases from petroleum USTs. In addition, EPA issued a rule, the "Lender Liability Rule for Underground Storage Tanks", that describes the specific conditions under which certain secured lenders may be exempted from RCRA Subtitle I regulatory requirements for discharges from petroleum underground storage tanks.

EPA hopes this rule will allow lenders to provide financing to gas station owners and operators and other small businesses with tanks on their property. The agency also hopes this rule will allow lenders to foreclose on a property with a federally regulated UST and qualify for the liability exemption. For more detailed information on the federal exemptions for lenders, please see the EPA's "Lender Liability Rule for Underground Storage Tanks: Fact Sheet" and the "Underground Storage Tank (UST) Lender Liability Rule". These regulations and documents are available on EPA's web site: <http://www.epa.gov/brownfields>.

Generally, lenders dealing with federally regulated USTs are exempt from potential responsibility for cleanup costs if they do not become involved in petroleum production, refining or marketing, managing or operating the UST. A lender also must empty its UST(s) within 60 days after foreclosure and the lender must either temporarily or permanently close the UST(s) unless there is a current operator at the site (other than the lender) who can be held responsible for compliance with UST regulatory requirements.

Furthermore, a lender who owns the property for over 12 months must make diligent efforts to sell the property. A lender who chooses to participate in management of or continue operation of USTs through storage, filling, or dispensing of petroleum is not eligible for the regulatory exemption and faces potential UST regulatory responsibility for corrective action in the event of a release.

Under this federal exemption, lenders may perform the following without incurring liability:

- perform loan origination;
- loan policing and work out (i.e. restructure or re-negotiate the terms of the security interest);
- foreclose on and sell the UST or UST property;
- perform environmental inspections or audits;
- perform corrective action for releases from USTs; or
- empty and close USTs.

Lender Protection from Superfund Laws

Superfund also has a security interest liability exemption, which protects certain lenders from liability under CERCLA (Superfund). The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996 amended CERCLA's secured creditor exemption to clarify the situations in which lenders will and will not be protected from CERCLA liability.

For more detailed information on this exemption, please see EPA's fact sheets: "Policy on CERCLA Enforcement Against Lenders and Government Entities That Acquire Property Involuntarily" and the "Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996". These documents are available on the EPA's web site at:

<http://www.epa.gov/brownfields/pdf/involun.pdf> and <http://www.epa.gov/docs/swerosps/bf/liab.htm#ll>, respectively.

Generally, lenders who take certain actions – including taking title to property – primarily to protect their security interest and do not “participate in the management” of a facility or business will not be held responsible under CERCLA.

“Participating in management” may include:

- exercising decision-making control over environmental compliance;
- exercising control at a level similar to that of a manager of the facility; and
- handling a substantial portion of the operational (as opposed to financial or administrative) aspects of the business.

“Participating in management” does not include:

- inspecting the facility or property;
- protecting the environment from a release of contamination;
- providing financial or other advice to prevent or cure default; and

- changing the terms of the security interest (provided these actions do not rise to a level of "participating in management" as defined in the above paragraph).

Lenders will maintain their exemption if, before foreclosure, the lender requests the borrower to clean up a property, requests the borrower to comply with environmental laws and regulations, and monitor the property, the borrower's business or financial condition. A lender also can undertake loan "workout" activities (i.e., restructure or re-negotiate the terms of the security interest and provide financial or other advice to the borrower).

After foreclosure, a lender who did not participate in management prior to foreclosure can maintain business activities, wind up operations, respond to an environmental release, and take actions to preserve, protect, or prepare the property for sale or disposition. Also, to preserve this exemption under CERCLA, lenders who own contaminated property must attempt to:

- sell the property;
- re-lease property held pursuant to a lease financing transaction (e.g., national bank lease financing, leveraged leases, and single-investor leases); or
- divest itself of the property at the earliest practicable, commercially reasonable time.

Frequently Asked Questions

Q1. What state environmental laws can lenders be exempt from?

The liability exemptions are generally from the state Hazardous Substance Discharge Law, commonly referred to as the Spill Law. However, lenders are not exempt from liability under other state laws, including hazardous waste laws or solid waste laws when they acquire property through foreclosure.

For non-emergency discharges, use the Fax Notification for Hazardous Substance Discharge Form available at: <http://dnr.wi.gov/org/aw/rr/archives/pubs/4400-225.pdf>. For emergency situations, call the 24-hour emergency telephone number (1-800-943-0003). Notifying the DNR in accordance with ch. NR 706 is a condition of the liability exemption. Submitting an environmental assessment is not equivalent to "immediate notification."

Q2. To qualify for the liability exemption, does a lender or representative who acquires real property need to conduct any environmental activities?

Yes. First, they must immediately notify the DNR of any discharge of a hazardous substance by following the reporting requirements of ch. NR 706 for hazardous substance discharges that may be discovered.

Second, if a lender takes title to or possession or control of real property, the lender must conduct an environmental assessment. The content and deadlines for completion are described in state statutes in s. 292.12, Wis. Stats.

Q3. What are my options for submitting the environmental assessment (EA) to DNR with regard to fees or requesting a review?

A lender may make two types of submittals to DNR. The submittal deadlines are defined by state law and summarized on page 6.

1.) the Lender Liability Exemption Environmental Assessment Tracking (Form 4400-196) is available on the Internet at: <http://dnr.wi.gov/org/aw/rr/archives/pubs/4400-196.pdf>. No fee is required and no review or determination will be provided. The DNR will simply acknowledge receiving the submittal.

2.) the Technical Assistance and Environmental Liability Clarification Request (Form 4400-237) is available at: <http://dnr.wi.gov/org/aw/rr/archives/pubs/4400-237.pdf>. For the \$500 fee, the DNR will provide a site-specific liability clarification letter describing the provisions in the exemption, if the conditions in the law have been met. This form and fee are also submitted if the original environmental assessment was conducted more than a year before the property was acquired. The visual inspection should be included as part of the submittal. DNR staff will review the assessment and respond in writing. Any identified deficiencies in the assessment will need to be corrected before the liability exemption is effective.

Q4. Do I need to conduct an environmental assessment and send that to the DNR if I believe the property is clean?

One reason to conduct an environmental assessment is to reduce the risk of acquiring contaminated property. If a property is clean, there is usually no reason to be concerned about environmental liability. In order to qualify for the exemption whether or not contamination is discovered, a lender must send the DNR an environmental

assessment that meets all the requirements in s. 292.21(1)(c)2, Wis. Stats. It is important to keep track of the acquisition date, conduct an environmental assessment that conforms to the state law, and file the report with the DNR within the specified number of days after the lender acquires title, or possession or control of, the property.

Q5. How does an environmental assessment differ from a site investigation?

An environmental assessment (EA) is an accepted set of procedures that identifies potential or known areas of environmental contamination. The DNR considers an environmental assessment as a two-phased process to identify the possibility of contamination and then confirm its presence at a property.

If a lender is acquiring property through the enforcement of a security interest, the lender should follow the specific environmental assessment criteria described on page 6 of this fact sheet and in s. 292.21, Wis. Stats.

Site investigations determine the nature, degree and extent of the environmental contamination on the site. For more information on site investigations, refer to ch. NR 716, Wis. Adm. Code.

Q6. Are lenders affected by the federal All Appropriate Inquiry requirements? Are AAI requirements equivalent to those in s. 292.21, Wis. Stats.?

Beginning on January 11, 2002, the federal Brownfields Amendments of 2002 required the creation of standards for conducting environmental due diligence that is called All Appropriate Inquiry (AAI). Conducting the AAI helps persons who **acquire** contaminated property and meet the applicable requirements to protect

themselves from federal Superfund (CERCLA) liability. The lender exemptions predate the All Appropriate Inquiry standards.

Lenders already have certain CERCLA exemptions as noted on pages 8-9, so they don't need to conduct an AAI to qualify for an exemption. For more information on AAI, see the EPA website at: <http://www.epa.gov/swerosps/bf/regneg.htm>. Also, the AAI is not equivalent to the environmental assessment required by Wisconsin statutes. When contracting with environmental professionals for environmental assessment services at properties under foreclosure, lenders should specify that the final report must include the requirements in s. 292.21, Wis. Stats.

Q7. Can a lender conduct a voluntary cleanup of a property and receive exemptions from liability?

Yes. Anyone who voluntarily conducts an investigation and cleanup of a property may enter into the Voluntary Party Liability Exemption (VPLE) process in order to receive a Certificate of Completion.

For more information on the Voluntary Party Liability Exemption see s. 292.15, Wis. Stats., and the "Voluntary Party Remediation and Exemption from Liability" fact sheet (Publication # RR-506).

This fact sheet can be found on the Remediation and Redevelopment web site: <http://dnr.wi.gov/org/aw/rr>, or it can be ordered from one of the DNR staff listed at the end of this document.

Q8. Can lenders who acquire property be exempt from liability if the discharge of a hazardous substance was from a federally regulated underground storage tank?

Yes. Since October 29, 1999, the lender liability exemption has included any discharges from those underground storage tanks that are large enough to be regulated under federal regulations. The requirements given in s. 292.21(1)(c), Wis. Stats., must be met to qualify for the exemption.

Q9. Is the lender and representative liability exemption transferable to others?

No. The lender liability exemption is not transferable to others under either federal or state law.

However, under the Voluntary Party Liability Exemption program, a property that is investigated and cleaned up in compliance with s. 292.15, Stats., can receive a liability exemption that is transferable to successors. For more information on the Voluntary Party Liability Exemption, see s. 292.15, Wis. Stats., and the fact sheet entitled "Voluntary Party Remediation and Exemption from Liability" (Publication # RR-506). This fact sheet can be found on the RR web site at <http://dnr.wi.gov/org/aw/rr>, or a paper copy can be ordered from one of the DNR staff listed at the end of this document.

Q10. Does the representative exemption protect the financial interests of the trust, estate or other entity for whom the representative is acting?

The personal assets of the representative that are not a part of the trust, estate or other entity being represented can not be attached for investigation and cleanup costs. However, if the representative acts for a trust, estate or other entity that is a responsible party (i.e., has possession or control of a hazardous substance that is discharged to the environment or has caused

a hazardous substance discharge), that entity remains responsible and may be required to investigate and cleanup the environmental contamination.

Q11. If I take title to a property and want to be protected under both state and federal laws, what must I do?

You must meet all the requirements of both federal and state laws to qualify for the

lender liability exemption, whichever is more stringent.

For example, if the state requirement is that an environmental assessment must be conducted, but federal law does not require an assessment, the lender would need to conduct and file an assessment that meets all the requirements in s. 292.21(1)(c)2, Wis. Stats., to be protected under both state and federal law.

This document contains information about certain state statutes and administrative rules but does not necessarily include all of the details found in the statutes and rules. Readers should consult the actual language of the statutes and rules to answer specific questions.

The Wisconsin Department of Natural Resources provides equal opportunity in its employment, programs, services, and functions under an Affirmative Action Plan. If you have any questions, please write to Equal Opportunity Office, Department of Interior, Washington, D.C. 20240

This publication is available in alternative format upon request. Please call 608-267-3543 for more information.

Who do I contact if I have questions?

Questions about the lender liability exemption should be directed to the Land Recycling Team contact in your local DNR regional office. Please see the map to determine within which region your property is located. Assessments and tracking forms should also be mailed to the following Land Recycling Team contacts:

DNR NORTHERN REGION

John Sager
(715) 623-4190 ext. 3125
Department of Natural Resources
223 East Steinfest Road
Antigo, WI 54409

DNR NORTHEAST REGION

Annette Weissbach
(920) 662-5165
Department of Natural Resources
2984 Shawano Avenue
Green Bay WI 54313

DNR SOUTH CENTRAL REGION

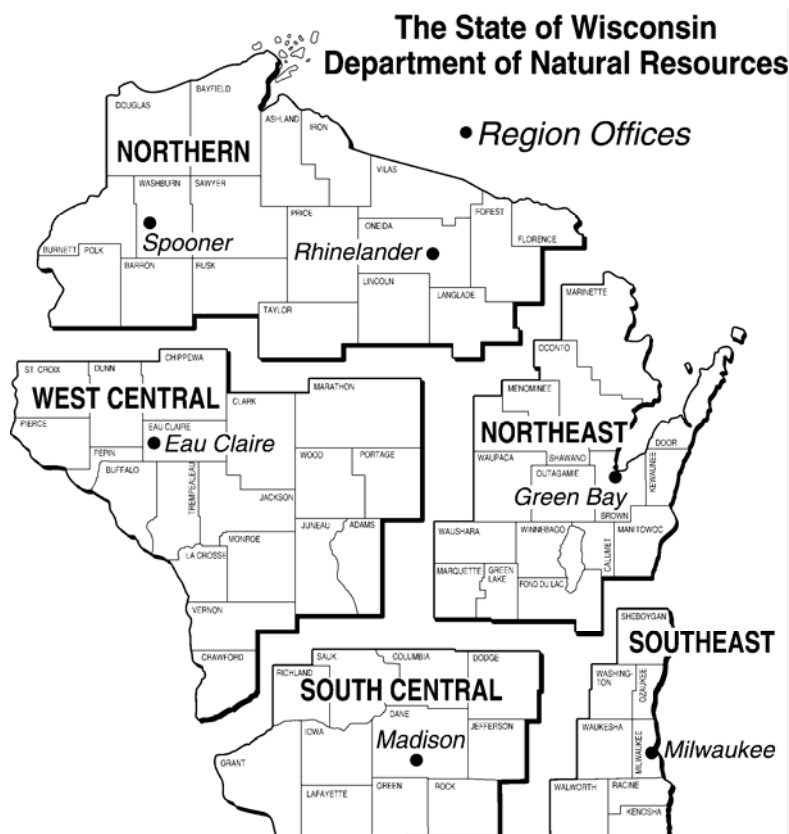
Mike Schmoller
(608) 275-3303
Department of Natural Resources
3911 Fish Hatchery Road
Fitchburg, WI 53711

DNR SOUTHEAST REGION

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(414) 263-8557
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2300 North Martin Luther King Drive
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Department of Natural Resources
1300 Clairemont Ave.
Eau Claire, WI 54702



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